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No. 74-1615

In the Supreme Court of the United States

OCTOBER TERM, 1975

KING RADIO CORPORATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The decision of the court of appeals (Pet. A1-A6) is reported at 510 F. 2d 1154. The decision and order of the National Labor Relations Board (Pet. A9-A68) are reported at 208 NLRB No. 82.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order (Pet. A7-A8) was entered on March

5, 1975, and a petition for rehearing was denied on March 24, 1975 (App. A, *infra*, p. 1a).[1] The petition for certiorari was filed on June 20, 1975.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the employer lacked a reasonable basis for believing that the union, which had been certified as the representative of its employees, no longer had majority support and thus was not privileged to withdraw recognition.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. A69-A72.

STATEMENT

In August 1966, the Communications Workers of America, AFL-CIO ("the Union") was certified by

[1] On May 12, 1975, the court below declined to stay its judgment (App. B, *infra*, p. 2a), and, on June 13, 1975, it adjudged petitioner in civil contempt for failing to comply with that judgment (App. C, *infra*, pp. 3a-6a).

[2] On the same date, Mr. Justice White denied a stay of the court of appeals' judgment pending final disposition of the petition.

the Board as the collective bargaining representative of a unit of employees of the King Radio Corporation ("the Company"), following a 182-114 vote in its favor (Pet. A10). Prior and subsequent thereto, the Company committed various unfair labor practices, which led to three Board orders within a thirteen-month period.[3] The orders, enforced by the court below, contained provisions requiring the Company to bargain with the Union in good faith (Pet. A10-A12, A35-A39).

The Company and the Union resumed bargaining, and met on 21 occasions. On February 18, 1972, the last negotiating session in this series, the parties were closer than ever before to a contract (Pet. A3, A27). The Company nevertheless ignored repeated Union efforts to continue the negotiations (Pet. A3, A10, A49-A50).

In August 1972, the Union filed unfair labor practice charges with the Board, alleging another refusal to bargain. In answering that charge, the Company —for the first time—questioned the Union's majority

[3] 166 NLRB 180 (June 28, 1967) (reprisals against two supervisors for testifying in the representation hearing, in violation of Section 8(a)(1) of the Act); 166 NLRB 649 (June 30, 1967) (unilateral changes in work rules, retirement benefits, and other employment terms, in violation of Section 8(a)(5) of the Act); and 172 NLRB 1051 (July 9, 1968) (surface bargaining and unilateral abrogation of 1967 wage structure, in violation of Section 8(a)(5) of the Act). The court below enforced the Board orders in the first two cases on July 22, 1968 (398 F. 2d 14), and enforced the order in the third case, in pertinent part, on September 17, 1969 (416 F. 2d 569, certiorari denied, 397 U.S. 1007).

status. At the hearing which ensued, it was established that the size of the unit had grown from 343 at the time of the 1966 election to 823 at the time the Company ceased bargaining with the Union and 876 when it claimed to doubt the Union's majority status. Moreover, because of considerable turnover, only 22 employees who were present at the time of the 1966 election remained in the unit (Pet. A58-A59, A64-A65).

The Board, reversing its Administrative Law Judge, concluded that the Company's reliance on the increased size of the unit and its large turnover did not establish "objective grounds for a reasonable belief that the Union had lost its majority status" since the 1966 election, because under settled authority, the "new employees will be presumed to support a union in the same ratio as those they may replace" (Pet. A24). The Board further concluded that the Company's claim of doubt of the Union's majority status was an "afterthought in response to the charge filed by the Union * * * and merely constituted another effort * * * to avoid the possibility of entering into an agreement with the [Union]" (Pet. A27). Accordingly, the Board held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Pet. A28).

The Board ordered the Company to cease and desist from these unfair labor practices and from in "any like or related manner" interfering with the employees' Section 7 rights; to bargain collectively with the Union as the unit representative; and to embody

such understanding as might be reached in a written signed agreement (Pet. A30-A31). The court of appeals enforced the Board's order (Pet. A1-A6).

ARGUMENT

1. It is well established that Board certification of a union as the representative of a unit creates a rebuttable presumption of continued majority status after the first year (*Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98). In the particular circumstances of this case, where the Company showed no more than that the bargaining unit had substantially expanded and that many employees had been replaced since the 1966 election, the Board properly concluded that the Company did not rebut the presumption of continued majority status. See *National Labor Relations Board* v. *The Little Rock Downtowner*, 414 F. 2d 1084, 1091 (C.A. 8), and cases there cited: *National Labor Relations Board* v. *Washington Manor, Inc.*, C.A. 6, Nos. 74-1881, 74-1882, July 24, 1975.[4]

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[4] There is no conflict among the circuits on the necessity for more evidence than this. In all the cases upon which petitioner relies (Pet. 19) there was additional evidence which cast doubt on whether support for the union had continued. Thus, in *National Cash Register* v. *National Labor Relations Board*, 494 F. 2d 189, 194 (C.A. 8), employee decertification petitions were filed with enough signatures to require a decertification election under the Board's procedures. In *Ingress-Plastene, Inc.* v. *National Labor Relations Board*, 430 F. 2d 542, 546 (C.A. 7), the union admitted to the employer that, in the unit of 156 employees, the 49 checkoff authorizations represented the upper limit of employee support. In

2. Contrary to petitioner's assertion (Pet. 11-18), there is no conflict of decisions as to the appropriate standard to be applied in withdrawal-of-recognition cases. Both *Celanese Corp.*, 95 NLRB 664 and *Stoner Rubber Co.*, 123 NLRB 1440, require that the employer support its claimed doubt of the union's majority status with reasonable grounds for believing that there has been a significant decline in support for the union.[5] As the Seventh Circuit noted in

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National Labor Relations Board v. *Laystrom Mfg. Co.*, 359 F. 2d 799, 800-801 (C.A. 7), while the union, which had won a close election, was willing to prove its continued majority status after the first two yearly contracts, it refused to do so again after expiration of the latest agreement. In *Capitol Aviation* v. *National Labor Relations Board*, 355 F. 2d 875, 877 (C.A. 7), 33 of the 58 unit employees signed a decertification petition. Finally, in *National Labor Relations Board* v. *H. P. Wasson & Co.*, 422 F. 2d 558, 559-560 (C.A. 7), the employer conducted a lawful poll wherein 27 of the 51 unit employees indicated a desire not to have the union.

[5] In *Celanese*, the Board stated (95 NLRB at 672): "[A]fter the certificate is a year old, as in cases where there is no certificate, the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, *provided* that the doubt is in *good faith*." The Board added (*id.* at 673): "There must * * * have been some *reasonable grounds for believing* that the union had lost its majority status since its certification" (emphasis added).

In *Stoner Rubber*, the Board stated (123 NLRB at 1445): "After the lapse of the certification year * * * to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit."

Orion Corp. v. *National Labor Relations Board*, 89 LRRM 2135, 2137 (Pet. 13-14), under both authorities the "'good faith doubt' must satisfy an objective test, although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time." As shown, the Company did not satisfy that minimum requirement in the instant case. There is thus no occasion to reach the question whether, had it done so, that would have provided an absolute defense to the refusal to bargain charge, or merely shifted the burden to the General Counsel to prove that the Union in fact possessed majority support (see n. 5, *supra*).[6]

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[6] The standards set forth in *National Labor Relations Board* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, are inapposite because they pertain to initial recognition in circumstances where a Board election is precluded. *Automated Business Systems* v. *National Labor Relations Board*, 497 F. 2d 262 (C.A. 6) (Pet. 18) is not to the contrary. There, unlike here, the employer had an objective basis for doubting the union's continued majority status. However, since the employer had committed other unfair labor practices which were sufficient to warrant the setting aside of a decertification election which the union had lost, it was appropriate to apply the *Gissel* criteria by analogy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
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DAVID S. FISHBACK,
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JULY 1975.

APPENDIX A

MARCH TERM—MARCH 24, 1975

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, and Honorable William E. Doyle, Circuit Judges

No. 74-1421

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KING RADIO CORPORATION, RESPONDENT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, INTERVENOR

This matter comes on for consideration of the Petition for Rehearing filed March 19, 1975, by Respondent King Radio Corporation in the captioned cause.

Upon consideration whereof, the Petition for Rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By /s/ Anne Cabot
Deputy Clerk

APPENDIX B

MARCH TERM—May 12, 1975

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, and Honorable William E. Doyle, Circuit Judges

No. 74-1421

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KING RADIO CORPORATION, RESPONDENT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, INTERVENOR

This matter comes on for consideration of Respondent's motion for recall of mandate and stay of reissuance pending application for certiorari in the captioned cause.

Upon consideration whereof, the motion is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX C

MAY TERM—JUNE 13, 1975

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, and Honorable William E. Doyle, Circuit Judges

No. 74-1421

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KING RADIO CORPORATION, RESPONDENT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, INTERVENOR

The National Labor Relations Board has moved for adjudication of respondent King Radio Corporation in civil contempt for its violation of the court's March 5, 1975, order for enforcement of the Board's award.

In August, 1966, Union was certified as the exclusive bargaining agent of an appropriate unit of respondent's employees. Three times we have ordered respondent to bargain with Union. See King Radio Corporation v. N.L.R.B., 398 F.2d 14, (July 22, 1968); N.L.R.B. v. King Radio Corporation, 416 F.2d 569, (November 17, 1969), cert. denied 397 U.S. 1007; and N.L.R.B. v. King Radio Corporation, 510 F.2d 1154, (February 12, 1975). In the last appeal we ordered the mandate to issue forthwith. Formal judgment was entered on March 5. Rehear-

ing was denied on March 24. On April 9, we denied respondent's motion for recall of mandate and stay pending application for certiorari. Eighty-one days have elapsed since we denied rehearing. The records in the office of the clerk do not disclose any notice from the Clerk of the Supreme Court that an application for certiorari has been filed and there is no record in this court of an application to the Supreme Court for stay pending certiorari.

The NLRB motion discloses that on May 19 the Union representative wrote respondent's lawyer requesting specified information and the resumption of bargaining on any or all of eight mentioned dates between May 22 and June 5.

On May 22, respondent's lawyer replied saying that "King Radio is filing an application for writ of certiorari in the United States Supreme Court"; that any recognition extended Union is "conditional"; that any agreement reached would "be conditioned upon final action by the United States Supreme Court;" that "King Radio is agreeable to resuming negotiations on June 2"; and that the requested information would then be available. On May 23 Union replied that it would not negotiate on a "conditional" basis and that "[a]t such time as the Company is willing to negotiate in good faith without conditions the Union is ready and willing."

Respondent's statement in opposition to the Board motion states that respondent's negotiating committee appeared at the point designated by Union on June 2 with the data requested by Union and that respondent

was "prepared to commence negotiations." It is further averred that no representative of Union appeared.

With its statement in opposition, respondent filed a motion for extension of time to file a memorandum, to present oral argument, and for an evidentiary hearing.

We have no patience with respondent's position. Eight years and ten months have gone by since Union was certified as representative of the employees. Respondent has consistently and persistently maneuvered to escape the impact of Board's awards and this court's decisions. We denied a stay of our last order and the records of the case show no attempt to secure a stay from the Supreme Court. We will not permit further disregard of our orders. If they may be ignored at the whim of a party, the entire enforcement procedure of the National Labor Relations Act is rendered meaningless.

The most that can be said for respondent is that it is willing to bargain on its own conditions. We have ordered bargaining in good faith. The exchange of correspondence and the persistent delays of respondent, show a wilful lack of good faith and present no justification for a further extension of time or an evidentiary hearing. On the admitted facts a summary adjudication of civil contempt is proper. See Reliance Mfg. Co. v. National Labor Relations Board, 7 Cir., 143 F.2d 761, and West Texas Utilities Co. v. National Labor Relations Board, D.C.Cir., 206 F.2d 442, cert. denied 341 U.S. 939.

Accordingly, it is ordered:

1. Respondent's "Motion for Extension of Time to File a Memorandum in Opposition, Present Oral Argument and for an Evidentiary Hearing" is denied.

2. The court finds that Respondent has wilfully failed and refused to bargain with Union in good faith and is in civil contempt of this court's March 5, 1975, judgment entered herein.

3. Respondent may purge itself of the contempt by

(a) Forthwith complying with and obeying the March 5, 1975, judgment;

(b) Forthwith notifying Union that it is ready and willing to promptly bargain collectively, unconditionally, and in good faith and, if an understanding is reached, to embody such understanding in a written agreement.

4. To assure compliance with this order and the March 5 judgment, the court will, on application of Board, assess a substantial compliance fine for each and every day after June 26, 1975, in which Respondent fails to comply with this order and the March 5 judgment.

5. In the event of noncompliance with this order and the March 5 judgment, the court will consider, on application of Board, the issuance of appropriate process against any officer or agent of Respondent responsible for noncompliance.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

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